No. 773

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH SHIELDS, PETITIONER

v.

BRADLEY C. SHARP, SECRETARY OF THE AIR FORCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law entered by the United States District Court for the District of Columbia (R. 97–100)[1] are not reported. The order of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the District Court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1960. On January 24, 1961, the time for filing a petition for a writ of certiorari was ex-

[1] All record references are to the Joint Appendix submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

tended to March 1, 1961. The petition for a writ of certiorari was filed on February 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner, having been dismissed from civilian government employment under the Lloyd-LaFollette Act after written notice of specific charges and an opportunity to reply, was deprived of statutory or constitutional rights by reason of the informal procedures followed in a grievance proceeding availed of by him under Air Force regulations.

2. Whether the allegedly unwarranted delay in bringing a charge against petitioner prevented his dismissal.

STATUTE AND REGULATIONS INVOLVED

The Lloyd-LaFollette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, 5 U.S.C. 652(a) provides, in pertinent part:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hear-

> ing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. * * *

The relevant regulations are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

On May 12, 1954, the petitioner, a non-veteran civilian employee of the Department of the Air Force, received a "Notice of Proposed Removal" signed by C. R. Landon, Major General, U.S.A.F., advising him that action was being initiated to remove him from his position because of "Immoral Conduct Off Duty" (R. 70–73). The charge recited specifically that through investigation it had been learned that the petitioner had engaged in abnormal sex acts with one Lieutenant Commander Herman Andrew Dudley, U.S.N.R., in 1944; that he associated with known homosexuals; and that he had resided at an address in Washington, D.C., which was a "hangout" for homosexuals and had failed to disclose this residence upon various official forms filled out by him for the Air Force between 1948 and 1953 in connection with his employment (R. 71–72). Since petitioner was not employed by the Air Force until 1948, all the allegations of misconduct, except the withholding of information, related to a period prior to his employment.

On May 19, 1954, the petitioner filed a written reply to the charges (R. 73–78). He admitted that he knew the individuals named and had resided at the Washington address; but he denied committing abnormal sex acts with Dudley and also denied knowing that the

other individuals were homosexuals and the Washington address a homosexual "hangout" (*ibid.*). He stated that the omission to list the address was unintentional.

The portion of the charge against the petitioner concerning his conduct with Dudley referred to an affidavit made by Dudley in 1945 for another purpose (R. 71). As the affidavit was an official confidential document belonging to another government agency, and concerned many other individuals as well as the petitioner, it was not made available to the petitioner's counsel nor to the Air Force investigator (R. 9–10, 38). However, the entire portion of the affidavit which concerned the petitioner was reproduced in the statement of charges (*ibid.*).

On May 14, 1954, Air Force investigators interviewed Dudley in Paris, France, and a report of the interview was transmitted to General Landon on June 1, 1954, after the charge had been made against the petitioner, but before the final notice of removal (R. 41). The petitioner's counsel was later permitted to see the part of the investigation report concerning this interview with Dudley (R. 99).

On June 14, 1954, the petitioner received a "Notice of Removal" stating that a final decision had been made to remove him from his position, effective June 15, 1954 (R. 78–81). This notice explained that the petitioner's reply had not been sufficient to warrant withdrawal of the charges (R. 79).

The petitioner was advised that he could request review of the removal decision by the Secretary of the

Air Staff, pursuant to the Air Force grievance procedure as set out in Headquarters Office Instruction ("H.O.I.") 40–47 (R. 81).[1] The petitioner, through his attorney, invoked this procedure and requested an oral hearing, which was held on July 28, 1954, before an Ad Hoc Grievance Committee appointed by the Secretary of the Air Staff in accordance with the provisions of Sec. 7(e)(1) of the Air Force Grievance Procedure Regulations, H.O.I. 40–47 (R. 1–70).[2] The proceeding before the Ad Hoc Grievance Committee was, by its nature, an administrative, rather than a quasi-judicial hearing, and the burden was on the petitioner to furnish information concerning his grievance (H.O.I. 40–47, Sec. 7(a) (App., *infra*, p. 14) (R. 99)). The committee was merely a fact finding body, convened for the purpose of advising the Secretary of the Air Staff with regard to the petitioner's case (H.O.I. 40–47, Sec. 7(e)(2) (App., *ingra*, pp. 14–15), R. 2). At the hearing, the petitioner did not produce any witnesses, and he did not testify, although he was free to do so (R. 98–99).

The petitioner had requested that General Landon be present at the hearing (R. 87). The committee,

[1] The Headquarters Office Instruction was issued by order of the Chief of Staff as the grievance procedure applicable for civilian personnel of Headquarters USAF Office of the Secretary of the Air Force, and Air Force field activities serviced by the Headquarters Civilian Personnel Office. The provisions of the Instruction are consistent with the provisions of Air Force Manual 40 1, Section 2, Paras. 1–15, which sets out the grievance procedure generally applicable to Air Force personnel.

[2] See App., *infra*, p. 14.

which did not have the power to compel the presence of witnesses (H.O.I. 40–47, Sec. 7(g) (App., *infra*, p. 16)), had requested General Landon to appear, but he was unable to be present on the date of the hearing (R. 7). The committee denied the petitioner's request for postponement of the hearing on the ground that Colonel Breeze, General Landon's executive officer, was present and could represent General Landon fully with respect to the petitioner's case (R. 15–16).

The petitioner had also requested the presence of a representative of the District of Columbia police department who could testify that certain persons named in the "Notice of Proposed Removal" were identified by the police department as homosexuals. The committee ascertained that it was the policy of representatives of the police department not to appear at such hearings and not to make their records available (R. 13). Prior to the hearing, the members of the committee went to the office of the Chief of the Morals Division of the police department, to verify the police report underlying the "Notice of Proposed Removal" and to attempt to obtain the presence of the officer at the hearing (R. 36–37, 99).[4]

Subsequent to the petitioner's hearing before the Ad Hoc Grievance Committee, the Secretary of the Air Staff sustained his removal (R. 88). Pursuant to the grievance procedure, the petitioner's case was further reviewed by the Office of the Chief of Staff of the Air Force and his dismissal was sustained by

[4] The officer advised the committee that he would not attend the hearing, and he did not do so (R. 35).

that office. Still under the terms of the grievance procedure, the petitioner then appealed to the Secretary of the Air Force. On May 18, 1956, the Secretary, acting through the Deputy for Manpower Personnel and Organization, advised the petitioner that the decision removing him was final (R. 99).

On June 26, 1956, the petitioner filed a suit for reinstatement against Secretary of the Air Force Donald A. Quarles. That suit was dismissed because of the petitioner's failure to make a timely substitution of the party defendant. The present suit for reinstatement was thereupon instituted. The petitioner urged that the Air Force had committed numerous violations of his procedural rights in removing him (R. 91–93). The district court entered judgment for defendant, concluding that the petitioner's dismissal was (R. 99–100) "in no way arbitrary nor capricious" and that the petitioner "was afforded all of the procedural rights prescribed" in the grievance procedure. On the petitioner's appeal, the Court of Appeals for the District of Columbia Circuit entered a *per curiam* order of affirmance. The order stated that the petitioner had been accorded his statutory and procedural rights (Pet. 1a).

ARGUMENT

1. It is clearly settled that matters relating to the discharge of federal executive employees are within the discretion of the employing agencies, and that judicial review of such matters is limited to the determination of whether the dismissal was effected in compliance with the applicable procedures and stat-

utes. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; see also *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970; *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A.D.C.). In the present case, both courts below held that, in discharging the petitioner, the Air Force complied with all of the applicable procedural requirements. Accordingly, there is no occasion for further review by this Court.

In conformity with the Lloyd-LaFollette Act, 5 U.S.C. 652(a), *supra*, pp. 2–3, and Civil Service Regulations, 5 C.F.R. 9.102(a)(1) (App., *infra*, p. 13), the petitioner received a detailed written notice of the charges preferred against him, opportunity to file a reply thereto, and a written decision stating that the charges had been sustained. These steps fully satisfied petitioner's statutory rights under the Lloyd-LaFollette Act.[6] The statute gives no right to a hearing and imposes no substantive limitations upon the discretion of the employing agency. And, contrary to the petitioner's argument, the Fifth Amendment does not grant government employees a right to a quasi-judicial hearing prior to removal.

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[6] The petitioner alleges that the dismissal was in violation of Civil Service Regulations (5 C.F.R. 9.102(a)(1) (App., *infra*, p. 13)) on the ground that it was based in part on charges not specified in the notice (Pet. 17).[5] The record (R. 56–57, 62–63) shows that the Air Force made further inquiry of the petitioner's accuser after the notice of charges was issued and considered the information so obtained in disposing of the case. However, there is no indication whatsoever that any evidence of additional acts of misconduct was received, rather than a reaffirmation of the original accusations. The final action was specifically based on the original charges (R. 79).

The original notice of proposed removal might perhaps be open to the technical objection that the specifications did not support the charge of "Immoral Conduct Off Duty" because the acts and associations specified were stated to have occurred prior to the petitioner's employment by the Air Force in 1948 (R. 70–72, 91). The petitioner, who was represented by counsel, has never raised this question, perhaps because he knew that the formal charge could have readily been amended to specify his concealment of his residence, which was alleged to be a "hangout for a homosexual clique" (R. 72). That concealment took place during his employment by the Air Force at various times from 1948 to 1953; was referred to in the charge (R. 71); and was specifically relied on in the dismissal (R. 80).

2. The bulk of the petitioner's argument deals with the procedures followed in connection with the grievance proceeding initiated by the petitioner to review his dismissal. It is important to understand that an Air Force grievance proceeding is not part of the dismissal procedure established under the Lloyd-LaFollette Act, nor is it established for the specific purpose of reviewing dismissals. It is a separate and an additional procedure adopted by the Air Force, following the labor relations practices established under collective bargaining, in order to enable the Secretary to deal with all kinds of complaints by civilian employees arising out of their employment. Thus, the petitioner had no constitutional or statutory right to a grievance hearing, and no rights under the procedure beyond those which the regulations gave him.

The petitioner does not assert that the grievance procedure was not conducted in accordance with the regulations. The burden of proof is on the grievant, as the regulations make clear, and there is no obligation on the Air Force to produce witnesses or present evidence justifying the action involved. An *ad hoc* committee is established to look into the complaint, make such investigation as is appropriate, and hear the complainant and his witnesses in the event he desires to appear. This is just what the committee here appointed did. It investigated the complaint and, after interviewing the police, made the results of such investigation available to the petitioner. It provided him with all the information he needed in order to present his case. It requested the presence of the witnesses desired by him and proceeded without the presence of the person responsible for his dismissal only when it had reason to believe that it would be possible to go ahead because another officer equally able to present the necessary information was present. This is not a situation where an accused must be faced with his accusers, because at this stage of the proceeding the petitioner was himself the accuser.

Neither *Greene* v. *McElroy*, 360 U.S. 474, nor the procedures established in connection with security cases (Pet. 10–11) have any relevance to the present litigation. The case and the regulations are both concerned with procedures to be followed in connection with the dismissal of employees on security grounds. The dismissal here was pursuant to the Lloyd-LaFollette Act

and the procedures under attack are those followed in the grievance proceeding.

3. The main complaint on the merits is that the affidavit which was the first item referred to in the specification of charges was executed nearly ten years before the charges were filed. However, there is no allegation that the facts came to the attention of the petitioner's superiors at that time, or at any specified time before action was taken. The petitioner's failure to list his residence at a "homosexual hangout" blocked investigations which might have been made sooner. There is therefore no basis for an accusation of unreasonable delay.

Whether the misconduct in the past was sufficient evidence of petitioner's undesirability as an employee at the time of his dismissal—a question which petitioner does not raise—was a substantive question of personnel policy for the executive department; it is not reviewable by the courts. *Eberlein* v. *United States*, 257 U.S. 82.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1961.

APPENDIX

Section 9.102(a)(1) of Civil Service Commission Regulations, 5 C.F.R. 9.102(a)(1) (1949 ed.) provides, in pertinent part:

> No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.
>
> * * * * *

The Federal Personnel Manual, TS 350 (Aug. 1, 1951 to Sept. 17, 1959), provided in pertinent part (at S1-21):

> *Decision by appointing officer.*—The question whether or not the reasons for the separation, suspension, or demotion are sufficient is a mat-

ter for final determination by the appointing officer. However, the separation, suspension, or demotion, if made, must be upon one or more of the charges presented to the employee and which he has had an opportunity to answer, and not upon others.

Section 7(a) of Headquarters Office Instruction 40–47 provides:

> 7. *Grievance Procedure:*
>
> a. *Employee Responsibility in Presentation of Grievance.*—An employee who wishes to present a grievance must furnish detailed and specific information concerning his grievance and will present it in accordance with the procedures in b and/or c below. The presentation, whether oral or written, must specify the exact nature of the employee's grievance and cite the name(s) of the person(s) complained against and specific incidents leading to the grievance, including date, time, place, and circumstances. Supervisors will be able to resolve grievances satisfactorily only if the employee furnished specific and complete information concerning his grievance.

Section 7(e) of Headquarters Office Instruction 40–47 provides:

> e. *Grievance Committee Hearings:*
>
> (1) *Composition of the Committee.*—The grievance committee will be appointed on an *ad hoc* basis by the Secretary of the Air Staff. The committee will be composed of Air Force personnel and will consist of four persons. A representative of the Headquarters Civilian Personnel Office will serve as a nonvoting chairman. At least two of the three voting members will be civilian employees one of whom will be of the same or similar working level as the employee presenting the grievance, whenever feasible. Attendance of the full membership of the committee will be required to constitute a quorum.

(2) *Functions of the Committee.*—The committee will serve as a fact-finding and advisory body. It has one primary purpose which is to assist the Secretary of the Air Staff in arriving at a prompt and fair decision by:

(a) Making a full and complete investigation of the evidence.

(b) Impartially appraising the evidence.

(c) Reporting to the Secretary of the Air Staff a record of the hearing proceedings, a statement of the committee's findings, and its recommendations.

* * * * *

(5) *Conduct of Committee Hearings:*

* * * * *

(d) *Order of Proceedings.* The order of proceedings will be as follows:

1. Testimony and other evidence by the employee and/or his representative; questioning by the person(s) complained against and committee members.

2. Testimony and other evidence by the employee's witnesses; questioning of each witness by the person(s) complained against and committee members. Each employee witness will be released, subject to recall if necessary, following completion of his testimony and questioning.

3. Testimony and other evidence by the persons who wish to refute or comment upon the employee's grievance; questioning by the employee, his representative, and committee members.

4. Witnesses of person(s) complained against; questioning of each witness by the employee, his representative, and committee members. Each witness will be released, subject to recall if necessary, following completion of his testimony and questioning.

5. Rebuttal and summation by both sides.

Section 7(g) of Headquarters Office Instruction 40–47 provides:

> (g) *Witnesses.*—The committee has no authority to compel witnesses to give testimony. However, if necessary to insure adequate presentation of testimony for either the complainant or the person(s) complained against, the committee may request appropriate administrative authority to require the attendance of Air Force employees as witnesses. The committee may also entertain a request from the employee and other persons giving testimony to call other witnesses in addition to those originally produced. When such a request is made, the committee may require an explanation of the purpose and the basis for the request and an indication that the testimony of the witness or witnesses requested will be competent, relevant, and material to the case. The committee may, in its discretion, decide not to call any additional witness if it considers the action unnecessary to a fair consideration of the grievance or otherwise impracticable for clearly demonstrable reasons.